IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35213/35868

STATE OF IDAHO,	)	**2009 Unpublished Opinion No. 660**
	)	
Plaintiff-Respondent,	)	**Filed: November 4, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
LEONARD J. KNAPP,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Gordon W. Petrie, District Judge.

Judgment of conviction for lewd conduct with a child under sixteen, affirmed; order denying Idaho Criminal Rule 35 motion for reduction of sentence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

PERRY, Judge Pro Tem

In this consolidated appeal Leonard J. Knapp was convicted of lewd conduct with a minor under the age of sixteen, Idaho Code § 18-1508. The district court imposed a unified thirty-year sentence with twenty years determinate and retained jurisdiction. The court later relinquished jurisdiction. Knapp filed an Idaho Criminal Rule 35 motion, which the district court denied. Knapp appeals in Docket No. 35213 challenging the district court's denial of his motion to dismiss the grand jury indictment and in Docket No. 35868 the denial of his Rule 35 motion. We affirm.

A grand jury indicted Knapp of two counts of lewd conduct with a child under sixteen. He moved for dismissal of the indictment on three grounds: insufficient evidence to establish identity, insufficient evidence to establish location and a broad claim that the evidence of the conduct was "so ambiguous as to produce a unanimity issue." The district court denied the

motion. Knapp pled guilty to one count preserving his right to appeal the district court's denial of his motion to dismiss and the remaining count was dismissed.[1]

On appeal Knapp does not assert that the evidence was insufficient to establish either identity or location. Rather, Knapp now claims that the evidence was insufficient as to time. It is well settled that issues not raised before the trial court will not be considered for the first time on appeal. *State v. Martin*, 119 Idaho 577, 579, 808 P.2d 1322, 1324 (1991). Knapp has failed to preserve this argument for appeal and we need not discuss it further. In addition, even if we were to address Knapp's claim, it has no merit. Time is not a material element of lewd conduct. *State v. Marsh*, 141 Idaho 862, 867, 119 P.3d 637, 642 (Ct. App. 2004). Accordingly, Knapp has failed to show that the indictment is defective thereby warranting dismissal.

Knapp also argues on appeal that because there was no evidence of genital-to-genital or oral-to-genital conduct the indictment should have been dismissed. Knapp apparently concedes, however, that evidence was presented of manual-to-genital conduct. At best Knapp has only shown that the language about genital-to-genital or oral-to-genital conduct is surplusage, which could have been stricken by the district court upon a proper motion filed by Knapp pursuant to I.C.R. 7(d). Knapp made no such motion. Knapp further argues that had the matter proceeded to trial a unanimity instruction would have been necessary as to which act the jury was finding that Knapp committed. Even assuming Knapp to be correct it does not render the indictment insufficient. The purpose of a grand jury is to establish probable cause that an offense has been committed and probable cause to believe that the accused committed it. I.C.R. 6.6(a). Knapp has shown no viable challenge to the grand jury's indictment.

Finally we address in Docket No. 35868 the district court's denial of Knapp's Rule 35 motion. A Rule 35 motion is a request for leniency which is addressed to the sound discretion of the sentencing court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v.*

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[1] Knapp's indictment stated:

> That the Defendant, LEONARD JAMES KNAPP, on or about a date and as a continuing course of conduct between June 1, 2004 through December 12, 2005, in the County of Canyon, State of Idaho, did wilfully and lewdly, commit a lewd and/or lascivious act upon and/or with the body of a minor, T.C. (dob 9/18/1994), under the age of sixteen years, to-wit: of the age of eleven (11) years, by manual to genital and/or oral to genital and/or genital to genital contact with the intent to arouse, appeal to and/or gratify the lust, passion and/or sexual desire of the defendant and/or said minor child.

Allbee, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 159 P.3d 838 (2007). Our focus on review is upon the nature of the offense and the character of the offender. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). Where a sentence is not illegal, the appellant must show that it is unreasonably harsh in light of the primary objective of protecting society and the related goals of deterrence, rehabilitation and retribution. *State v. Broadhead*, 120 Idaho 141, 145, 814 P.2d 401, 405 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992); *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Having reviewed the record, including the new information submitted with Knapp's Rule 35 motion, we find no abuse of discretion in the district court's denial of the motion.

Knapp has failed to demonstrate error in the district court's denial of Knapp's motion to dismiss the indictment or its denial of his Rule 35 motion. Accordingly, Knapp's judgment of conviction and the district court's order denying Knapp's I.C.R. 35 motion are affirmed.

Judge GUTIERREZ and Judge MELANSON **CONCUR.**